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No. 85-81 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHRISTMANN & WELBORN, PETITIONER

v.

UNITED STATES DEPARTMENT OF ENERGY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner could not equitably estop a federal agency on the basis of an oral representation by an official of another agency.

2. Whether the court of appeals correctly held that petitioner was liable for all of the crude oil overcharges that it caused.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not yet reported. The memorandum of the district court (Pet. App. 9a-21a) is reported at 589 F. Supp. 576. The decision of the Department of Energy (Pet. App. 29a-41a) is reported at 2 D.O.E. ¶ 80,194.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1985, and a petition for rehearing was denied on April 17, 1985 (Pet. App. 43a). On May 6, 1985, the Chief Justice granted petitioner's request for an extension of time until July 16, 1985, to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under Section 211(g) of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. (1976 ed.) 1904 note, as incorporated by Section 5(a)(1) of the Emergency

Petroleum Allocation Act of 1973, Pub. L. No. 93-159, 87 Stat. 633.[1]

STATEMENT

1. Petitioner is the operator of a unitized crude oil producing property. The unit was formed in September 1973 by combining eight pre-existing oil and gas leases. Petitioner controls 80% of the working interest in the unit. Pet. App. 1a.

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[1]The petition for a writ of certiorari appears to be jurisdictionally out of time. Section 211(g) of the ESA, 12 U.S.C. (1976 ed.) 1904 note, provides in pertinent part:

> Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code * * *.

Although the rehearing petition was denied on April 17, 1985, the petition for a writ of certiorari was not filed until July 16, 1985. The time limits established by Congress for petitioning for certiorari are jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942).

Petitioner did obtain an extension of time for filing a petition in this case. However, neither Section 211(g) nor 28 U.S.C. 1254 explicitly authorizes such an extension of time. The general time provision for filing a certiorari petition in a civil case, 28 U.S.C. 2101(c), does permit extensions of up to 60 days, but that subsection also grants a litigant an initial 90-day period in which to file a petition. It is most unlikely that Congress intended the 90-day initial period of Section 2101(c) to be inapplicable to Temporary Emergency Court of Appeals (TECA) cases, as it surely is in light of Section 211(g), yet to allow the 60-day extended period to be applied in such cases. Indeed, if the availability of a 60-day extension is implied, the purpose of substituting a 30-day time limit for the 90-day time limit of 28 U.S.C. 2101(c)—*i.e.*, to expedite review of TECA cases (see S. Rep. 92-507, 92d Cong., 1st Sess. 10 (1971))—would be substantially defeated. See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825-826 (1980).

Shortly before the unit became effective, a predecessor agency to the Department of Energy (DOE)[2] promulgated Phase IV price controls for domestic crude oil pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. (1976 ed.) 1904 note. See 6 C.F.R. Pt. 150, Subpt. L (1974); see also 10 C.F.R. Pt. 212, Subpt. D (1975) (regulations as repromulgated under the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. 751 *et seq.*). These controls instituted a two-tier pricing mechanism designed to dampen the inflationary spiral in crude oil prices without eliminating the economic incentives for increasing domestic production. In general terms, the two-tier system provided that production in each month that did not exceed the "base production control level" (BPCL) for the property, defined as production from the same property in the same month in 1972, was "old oil" subject to a controlled price, while production in excess of the BPCL was "new oil" that could be sold at market prices. See 6 C.F.R. 150.354 (1974); 10 C.F.R. 212.72 (1975).

In 1975, DOE published a ruling addressing the computation of the BPCL for units, like petitioner's, formed after 1972. Ruling 1975-15, 40 Fed. Reg. 40832. Reiterating the position it had taken earlier,[3] DOE explained that a unit's BPCL was "the total 1972 monthly production from all of the several leases that now comprise the unit" (*ibid.*). The agency rejected the position advanced by petitioner that the

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[2]Hereafter, we will use DOE to refer to its predecessor agencies as well as to the Department itself. The various agencies are set forth in *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 161 & n.6 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

[3]On five occasions in 1974 and early 1975, DOE responded to requests from individual companies for interpretations applying the regulation's definitions of BPCL and property in the context of unitization. Rulings 1974-22, 1975-2, 1975-4, 1975-10, and 1975-27, later published at 42 Fed. Reg. 23723, 23726, 23730, 23740, and 25659 (1977). See *Pennzoil Co.*, 680 F.2d at 162-163 & n.11.

BPCL for a unit was zero (allowing all of its production to be sold at the higher new oil prices) merely because the unit did not exist in that form in 1972: "[u]nder no circumstances * * * would a post-1972 unitization create a 'new' property, *i.e.*, one that has no BPCL" (*ibid.*). Ruling 1975-15 and its retroactive application were upheld in *Pennzoil Co.* v. *DOE*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).

2. Beginning in 1974, petitioner sold all of the production from its unit at new oil prices. In 1977, DOE issued a remedial order to petitioner, finding that its prices exceeded the lawful maximum and requiring it to refund overcharges of $3.4 million plus interest. Pet. App. 2a-3a. On administrative appeal, petitioner defended in part on the ground that DOE was equitably estopped from enforcing the price control regulations. Petitioner based its estoppel argument on its allegation that Duke Ligon, while an official in the Department of the Interior, had told one of its joint venturers at a symposium in 1973 that he viewed the regulations as permitting the sale of all oil from newly unitized properties at new oil prices (*id.* at 36a).

The agency determined that petitioner could not estop the government because its reliance on Ligon's oral advice was not justifiable (Pet. App. 36a-37a). The agency also held petitioner liable for the full extent of the overcharges, including those attributable to the 20% of the working interest held by other owners, reasoning that petitioner "had primary responsibility in pricing the crude oil produced from the Unit" (*id.* at 39a).

3. a. Petitioner sought review in the United States District Court for the Northern District of Texas, and DOE counterclaimed to enforce its order. On cross-motions for

summary judgment, the district court affirmed DOE's order except as to the 20% of the working interest not held by petitioner (Pet. App. 9a-21a). In rejecting petitioner's estoppel argument, the district court, relying on *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 13, concluded that Ligon's oral advice was "insufficient" to give rise to an estoppel (Pet. App. 16a) and that, as a sophisticated producer, petitioner should have been aware of the proper interpretation of the regulations (*id.* at 14a, 16a-17a). The district court limited petitioner's liability to its 80% working interest in the unit on the ground that it would not have been burdensome for the agency to join all of the owners in a single proceeding (*id.* at 18a). Finally, the district court remanded the case to DOE for reconsideration of the appropriate remedy in light of oil price decontrol and a settlement reached between petitioner and its purchaser (*id.* at 10a, 20a).

b. On cross appeals, the court of appeals ruled that DOE was not estopped from applying its regulations to petitioner and that the agency did not abuse its discretion in holding petitioner liable for all of the overcharges (Pet. App. 1a-8a). The court of appeals held that estoppel was unavailable because petitioner could not reasonably have relied on "the *oral* comments made in good faith by an official of *another* agency" (*id.* at 6a; emphasis in original). The court of appeals concluded that because petitioner "caused the overcharges" (*id.* at 7a) and seeking refunds from each owner would be unduly burdensome, DOE did not abuse its discretion by ordering petitioner to refund the full amount of the overcharges (*id.* at 7a-8a).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Moreover, the decision is interlocutory because the

case has been remanded to the agency for reconsideration of the remedy.[4] Review by this Court is plainly unwarranted.

1. Petitioner contends (Pet. 10-20) that DOE should be estopped from enforcing its price control regulations because of Ligon's allegedly erroneous oral advice in 1973. As this Court has recently made clear, "however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present." *Heckler* v. *Community Health Services*, No. 83-56 (May 21, 1984), slip op. 9. Both courts below found that petitioner had failed to satisfy this standard because its reliance on Ligon's advice was unreasonable. This factbound conclusion merits no further review.[5]

In *Community Health Services*, the Court set forth a number of reasons why persons may not justifiably rely on oral advice as a basis for estopping the government (slip op. 13):

> It is not merely the possibility of fraud that undermines our confidence in the reliability of official action that is not confirmed or evidenced by a written instrument. Written advice, like a written judicial opinion, requires

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[4]Because this case is interlocutory, there is no reason to hold the petition, as petitioner suggests (Pet. i n.*), for a petition to be filed in *United States* v. *Exxon Corp.*, No. DC-91 (Temp. Emer. Ct. App. July 1, 1985). Whatever action is taken in that case, petitioner will be able to protect its interests on remand here.

[5]Because petitioner did not satisfy the traditional elements of estoppel, this case presents no occasion for the Court to consider whether the government may ever be estopped and, if so, what facts a plaintiff must prove in addition to those required to estop a private party. See *Community Health Services*, slip op. 8-9. Contrary to petitioner's contention (Pet. 14), the court of appeals' decision rests not on the absence of affirmative governmental misconduct (although the court noted that factor), but on the absence of reasonable reliance (Pet. App. 5a-6a).

> its author to reflect about the nature of the advice that is given to the citizen, and subjects that advice to the possibility of review, criticism and reexamination. The necessity for ensuring that governmental agents stay within the lawful scope of their authority, and that those who seek public funds act with scrupulous exactitude, argues strongly for the conclusion that an estoppel cannot be erected on the basis of the oral advice [on which the plaintiff relied].

See also *Schweiker* v. *Hansen*, 450 U.S. 785 (1981) (refusing to estop government on basis of oral misrepresentation).[6] The fact that Ligon "was not even an official of the agency that issued or enforced the regulations" (Pet. App. 5a) makes petitioner's reliance on his oral advice all the more unreasonable.[7]

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[6]The agency, moreover, refused to credit petitioner's claim that the advice had in fact been given (Pet. App. 36a). Petitioner's contention (Pet. 6 n.5, 13 n.13, 15) that its reliance on Ligon's purported oral advice was reasonable because there was at the time no mechanism in place to obtain a written ruling was rejected in *Community Health Services*, slip op. 13 n.22 (even if the plaintiff "did all it could have done" to obtain authoritative advice, that "would not make [its] reliance * * * any more reasonable"). That public funds were at stake in *Community Health Services* does not distinguish the case in a material respect. See, *e.g.*, *INS* v. *Miranda*, 459 U.S. 14 (1982) (government not estopped from denying visa application). As with the immigration laws at issue in *Miranda*, oil price controls "implicat[e] matters of broad public concern," making estoppel inappropriate even "in the absence of [a] potential burden on the fisc" (*id.* at 19).

[7]Although petitioner often repeats its contention that the government designated Ligon as its "authoritative" spokesman (Pet. i, 3, 5, 6, 10, 11, 14), it does not suggest, beyond referring to Ligon's position, that DOE had in fact authorized him to make binding oral representations with respect to the agency's regulations. Even if Ligon's position did carry with it the authority to promulgate legally binding interpretative rulings, his oral remarks during a conversation at a symposium could

Finally, the proper application of the regulations to unitized property was inherent in the regulations even before Ruling 1975-15 was issued. *Pennzoil Co.* v. *DOE*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982), cert. dismissed, 459 U.S. 1190 (1983).[8] Petitioner's reading of the regulations would have allowed oil producers to evade price controls merely by redefining existing properties and designating their production as "new oil." Such "gerrymandering of boundaries undertaken to avoid price controls" (680 F.2d at 169), which would have "disrupt[ed] essential accepted agency functions in favor of self-serving choices of the regulated" (*id.* at 173), was barred by the regulations. It was quite obviously unreasonable for petitioner, which was "hardly an innocent abroad" (*id.* at 179), to rely on an oral statement that was inconsistent with the regulations as they stood at the time, regulations of which petitioner was bound to and did have notice. See *Community Health Services*, slip op. 12.

2. Petitioner also contends (Pet. 20-24) that it should be liable for only 80% of the overcharges, *i.e.*, those related to its working interest in the unit. The basis for its liability, however, is not, as petitioner contends (Pet. 20), solely administrative convenience. While the just and expeditious

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hardly be accorded the same weight as a duly issued opinion. In any event, at the time of Ligon's oral advice the regulations provided that interpretations of agency regulations must be in writing (see Pet. App. 5a). Petitioner's reliance on informal oral advice was therefore totally unjustifiable.

[8]In *Pennzoil Co.*, as here, the court of appeals held that it was unreasonable to rely on informal advice that unitized properties could sell all of their production at new oil prices (680 F.2d at 171-172). In arguing that the regulations in 1973 were ambiguous, petitioner relies (Pet. 13 n.14) on the concurring opinion in *Pennzoil Co.*, ignoring the court's opinion, which came to the contrary result. Even the concurring judge, moreover, concluded that reliance on unofficial interpretations of the regulations was not justified (680 F.2d at 180).

conclusion of enforcement proceedings under the now-defunct price control program would be impossible if the government were required to proceed separately against each of the sometimes thousands of parties with ownership interests in a particular property, the substantive basis for petitioner's liability was its position as the operator of the unit. As the court of appeals found, petitioner "caused the overcharges" (Pet. App. 7a). Petitioner made pricing decisions on behalf of all of the owners (*id.* at 39a). Its entire liability rests on its own misconduct, not that of others. No state-created rights have been displaced.

The court of appeals relied on its earlier decision in *Sauder* v. *DOE*, 648 F.2d 1341, 1347-1349 (Temp. Emer. Ct. App. 1981), in holding that operator liability for the full extent of overcharges in these circumstances is in accordance with the scheme established by Congress in the Emergency Petroleum Allocation Act of 1973 (Pet. App. 7a-8a). This conclusion by the Temporary Emergency Court of Appeals, "a court intimately familiar with the intricacies of federal energy regulation" (*Tully* v. *Mobil Oil Corp.*, 455 U.S. 245, 248 (1982)), is consistent with decisions of other courts of appeals in analogous contexts and warrants no further review. See *SEC* v. *Texas Gulf Sulphur Co.*, 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971); *Tenneco Oil Co.* v. *FPC*, 442 F.2d 489 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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